

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Atlantic Cement Company, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation
Franchise Tax under Article 9A & 27 of the Tax Law :
for the Year 1973.

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of February, 1983, he served the within notice of Decision by certified mail upon Atlantic Cement Company, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Atlantic Cement Company, Inc.
Att: Lawrence C. Leonard
P.O. Box 30
Stamford, CT 06904

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
11th day of February, 1983.

David Parchuck

Conrad A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 11, 1983

Atlantic Cement Company, Inc.
Att: Lawrence C. Leonard
P.O. Box 30
Stamford, CT 06904

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ATLANTIC CEMENT COMPANY, INC.
for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Articles 9A and 27 of the Tax Law for the
Year 1973.

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DECISION

Petitioner, Atlantic Cement Company, Inc., P.O. Box 30, Stamford, Connecticut, 06904, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Articles 9A and 27 of the Tax Law for the year 1973 (File No. 33252).

Petitioner has waived a formal hearing and submits its case for decision based on the record as it exists. After due consideration of the record, the Commission renders the following decision.

ISSUE

Whether petitioner's claim for credit or refund of corporation franchise tax, premised on a net operating loss carryback, was timely filed within the meaning and intent of sections 1087(d) and 1089(c) of the Tax Law.

FINDINGS OF FACT

1. On September 14, 1976, petitioner, Atlantic Cement Company, Inc., ("Atlantic") filed a New York State Corporation Franchise Tax Report (Form CT-3) for the year 1975, on which it showed a net operating loss in the amount of \$1,627,284.00.

2. Attached to Atlantic's 1975 report was a schedule showing the manner in which it had carried back the above net operating loss to tax year 1973 and recomputed its tax liability for that year. Also attached to Atlantic's report

was a letter stating, in pertinent part, that "...we have a Net Operating Loss Carryback to 1973 which generates a refund of \$170,761 from the 1973 tax. Please refund this amount. (Schedule attached.)".

3. In the latter part of 1980, the Audit Division audited several of Atlantic's tax reports, including the one filed for 1975. On December 19, 1980, Atlantic filed a Claim for Credit or Refund of Corporation Tax Paid (Form CT-8) for the year 1973 in the amount of \$170,761.00. This claim was based on the recomputation of Atlantic's 1973 tax liability by carrying back to 1973 the net operating loss reported by Atlantic in 1975. (see Finding of Fact "2").

4. Atlantic was advised by the Audit Division, in a letter dated January 30, 1981, that its claim for credit or refund for 1973 was denied due to the fact that the claim was not timely filed in accordance with sections 1087(d) and 1089(c) of the Tax Law and regulations thereunder.

5. On April 21, 1981, Atlantic filed a petition contesting the above disallowance, and by a writing dated October 2, 1981, signed by Atlantic's treasurer, Lawrence C. Leonard, waived a formal hearing and submitted its case for decision by the State Tax Commission based on the record as it exists.

6. Atlantic asserts it closely followed the instructions (located on the reverse side of Form CT-3) in filling out its 1975 report. Atlantic specifically cites instruction 14 for Form CT-3, which provides:

"Item 9: Net operating losses may be carried back to the preceding three taxable periods and/or forward to the following five taxable periods, as provided by Section 172 of the Internal Revenue Code. The amount of any Federal loss must be adjusted in accordance with Section 208(a), (b) and (g) of Article 9A. The deduction shall not exceed the deduction allowable for Federal purposes, or the deduction which would have been allowable if the taxpayer had not made an election under Sub-chapter S of Chapter One of the Internal Revenue Code, or had not elected to be included in a group reporting on a consolidated basis for Federal income tax purposes. Net operating losses may be carried to the same year as for Federal tax purposes and to no other year. Attach copy of schedule supporting the deduction claimed at Item 29(a) on page 1 of the Federal return" (Emphasis Added).

Petitioner notes that instruction 14 makes no reference to any requirement of filing a Form CT-8 (Claim for Credit or Refund), but only requires that a separate schedule supporting the Federal net operating loss deduction [Item 29(a)] be included with the tax report.

CONCLUSIONS OF LAW

A. That section 1087(d) of the Tax Law in pertinent part provides:

"Overpayment attributable to net operating loss carryback. - A claim for credit or refund of so much of an overpayment under article nine-a as is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due for the taxable year of the loss,...".

B. That section 1089(c) of the Tax Law in pertinent part provides:

"Petition for refund. - A taxpayer may file a petition with the tax commission for the amounts asserted in a claim for refund if -

(1) the taxpayer has filed a timely claim for refund with the tax commission,

(2) the taxpayer has not previously filed with the tax commission a timely petition..., and

(3) either (A) six months have expired since the claim was filed, or (B) the tax commission has mailed to the taxpayer,..., a notice of disallowance of such claim in whole or in part."

C. That instruction 14 for Form CT-3 relied upon by petitioner herein (see Finding of Fact "6") required petitioner to submit a schedule in support of any net operating loss deduction claimed by petitioner at line 29(a) of its 1975 U.S. Corporation Income Tax Return (and consequently in support of any amount claimed as a New York net operating loss deduction at Line 9, Schedule B of Form CT-3). Instruction 14 speaks only to the required schedule in support of amounts of net operating loss from other years being carried to and deducted on the return for the particular (current) tax year (here 1975), and does not speak to the method or requirements for recomputing tax liability for other

(preceding) tax years or for claiming potential refunds arising therefrom. Accordingly, petitioner's reliance on a lack of reference to Form CT-8 in instruction 14 is misplaced.

D. That former 20 NYCRR 6.10(d), (effective during the period at issue herein) in pertinent part provides:

"[a]n application for revision or refund must be made on the form prescribed by the State Tax Commission (Form CT7) or by some written document containing substantially all the information called for by such form...." (emphasis added).¹

E. That Form CT-7 (later replaced by Form CT-8) required, inter alia, information concerning the name and address of the corporate taxpayer, the year(s) involved, and a statement explaining the basis for the change(s) sought by the taxpayer. Petitioner's letter of September 14, 1976 requesting a refund of \$170,761.00, together with the attached schedule explaining the computations forming the basis for the requested refund, (see Findings of Fact "1" and "2") contained "substantially all the information called for" by Form CT-7, and constituted a valid and timely claim for refund within the meaning and intent of section 1087(d) of the Tax Law and former 20 NYCRR 6.10(d). Furthermore, the petition filed on April 21, 1981, contesting disallowance of the claimed refund was timely and proper within the meaning and intent of section 1089(c) of the Tax Law.

¹ Current regulations, in pertinent part, provide:

"Method of claiming credit or refund on account of net operating loss. (a) A taxpayer claiming a credit or refund of franchise tax paid under article 9-A for a year to which a net operating loss is carried back as a deduction must file an application for credit or refund of the tax paid. The taxpayer must:

(1) file its claim on forms prescribed by the Tax Commission..." (20 NYCRR 3-8.9) (emphasis as in original).

F. That the petition of Atlantic Cement Company, Inc., is hereby granted and the disallowance of its claim for credit or refund is cancelled. The Audit Division is hereby authorized to refund to petitioner such amount as may be lawfully due for 1973.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

Robert T. Baulant
ACTING PRESIDENT

Francis R. Koenig
COMMISSIONER

John J. [unclear]
COMMISSIONER